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UNITED STATES OF AMERICA
BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION
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FEDERAL ENERGY REGULATORY COMMISSION

Deseret Corporation,)
Bonneville Power Administration,)
Idaho Power Company,)
Montana Power Company,)
Nevada Power Company,)
PacifiCorp,)
Portland General Electric Company,)
Puget Sound Energy, Inc.,)
Sierra Pacific Power Company)

Docket No. RT01-35-001

Avista Corporation,)
Montana Power Company,)
Nevada Power Company,)
Portland General Electric Company,)
Puget Sound Energy, Inc.,)
Sierra Pacific Power Company)

Docket No. RT01-15-001

**APPLICATION FOR REHEARING AND
REQUEST FOR CLARIFICATION OF
DESERET GENERATION & TRANSMISSION CO-OPERATIVE, INC.**

Pursuant to Section 313(a) of the Federal Power Act ("FPA") and Rule 713 of the Commission's Rules of Practice and Procedure,² Deseret Generation & Transmission Co-operative, Inc. ("Deseret") hereby requests rehearing and clarification of the April 26, 2001 "Order Granting, With Modification, RTO West Petition for Declaratory Order and Granting TransConnect Petition for Declaratory Order," 95 FERC ¶ 61,114 (2001), issued in the above captioned proceedings ("April 26 Order").

¹ 16 U.S.C. § 825f(a).

² 18 C.F.R. § 385.713 (2000).

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JERIC DOUKET

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Deseret is a party to these proceedings by virtue of its timely interventions filed in both the RTO West and TransConnect Dockets. Additionally, Deseret filed two substantive pleadings in Docket No. RT01-35-000 in response to the RTO West Stage 1 Proposal: (1) the "Protest and Comments of Deseret Generation & Transmission Co-operative, Inc." filed on November 20, 2000, in response to the initial submission of the RTO West Stage 1 Proposal ("November 20 Pleading"); and (2) the "Protest, Comments and Status Report of Deseret Generation & Transmission Co-operative, Inc." filed on January 16, 2001, in response to the December 1, 2000 "Concurring Utilities' Amended Supplemental Compliance Filing and Request for Declaratory Order Pursuant to Order No. 2000" ("January 16 Pleading").

I. SPECIFICATIONS OF REHEARING ERRORS AND REQUESTED CLARIFICATIONS

The following aspects of the April 26 Order are erroneous or require clarification to provide proper guidance under Order Nos. 2000 and 2000-A:¹

- A. The Commission erred by failing to direct the filing utilities to cease excluding other jurisdictional transmission owners ("TOs") from the Filing Utilities Group.
- B. The Commission erred by failing to rule on Deseret's proposed clarification of the definition of "Affiliate" contained in the proposed RTO West bylaws.
- C. The Commission erred by failing to rule on the issue of allowing smaller TOs to participate in the Major Transmitting Utility Class.
- D. The Commission Should Clarify Its Position Regarding The Eligibility of TOs Other Than TransConnect for Incentive/Innovative Rates Under the RTO West Structure.

¹ *Regional Transmission Organizations*, ORD-00 NO. 2000, FERC Stat. & Regs. ¶ 31,089 (1999) ("Order No. 2000"); order on reh'g, ORD-00 NO. 2000-A, FERC Stat. & Regs. ¶ 31,092 (2000) ("Order No. 2000-A"), appeal pending sub. nom. *Public Utility District No. 1 of Snohomish County, Washington et. al v. FERC*, Docket No. 00-1174 (DC Cir.).

- E. The Commission should clarify that incentive rate mechanisms will be available to TransConnect (upon a proper showing of eligibility), not to the "passive" owners of TransConnect.
- F. The Commission should clarify its position on multiple RTO seams issues, pending creation of a "West-wide" RTO.
- G. The Commission erred in rejecting the Limited Liability Agreement without fully considering the practical and legal ramifications of such a rejection.
- H. The Commission should clarify that certain issues Deseret raised regarding the RTO West Stage 1 and Stage 1-A filings that were not addressed in the April 26 Order have not been decided adversely to Deseret *sub silentio*.

II. ARGUMENT

A. The Commission Erred By Failing To Direct The Filing Utilities To Cease Excluding Other Jurisdictional Transmission Owners From The Filing Utilities Group.

In its November 20 Pleading, Deseret noted that it was the only FERC-jurisdictional public utility that owns transmission facilities contemplated to be part of the RTO West transmission system that was not a sponsor of the Stage 1 Proposal. Deseret explained that it had been, in fact, purposefully excluded from the Filing Utilities Group by the other TOs. As a result, Deseret did not have an opportunity to be adequately represented in all RTO West decision-making processes affecting TO interests.

Subsequently, on December 5, 2000, the Filing Utilities submitted their "Answer to Motions to Consolidate and Request for Leave to File Answer to Protests to the RTO West October 23, 2000 Filing" ("December 5 Answer"). In their December 5 Answer, the Filing Utilities stated:

[Deseret] also wants to participate in Stage 2 on the same basis as the Filing Utilities. Deseret's comments are under consideration, but it would be similarly counterproductive

for the Commission to attempt to dictate the extent of Deseret's participation in Stage 2.

December 5 Answer at 10, fn. 15 (internal citations omitted).

In its subsequent January 16 Pleading, Deseret filed a "Status Report" to the Commission regarding its participation as a member of the Filing Utilities Group. Deseret explained that the Filing Utilities had not as of that time formally contacted Deseret to discuss the possibility of joining their group, despite the statements in their December 5 Answer. This, in fact, remains true to this day. Thus, Deseret requested that the Commission act to remedy this discriminatory practice, and to do so in time for Deseret to meaningfully participate in the Stage 2 negotiations.

The April 26 Order, however, summarized Deseret's argument in one sentence: "Deseret requests that it be afforded more participation rights in the Stage 2 process." 95 FERC at 61,325. Thereafter, in addressing this concern and other issues raised by other differently situated parties, the Commission stated only that

the RTO West Applicants have adequately responded to these concerns. As noted above, the RTO West Participants have engaged in an open and inclusive process thus far, and we do not see the need at this time to dictate the Stage 2 process. Furthermore, an open public process has been established for the remainder of the RTO West Proposal.

Id.

The Commission did not represent Deseret's position accurately in the April 26 Order, in that Deseret's request in its January 16 Pleading was to have equal participatory rights as a member of the Filing Utilities Group for the Stage 2 Process and for the remainder of the RTO negotiation process. Furthermore, the Commission did not explain

how the "RTO West Applicants" (*i.e.*, the Filing Utilities Group) had addressed Deseret's specific concern as a prospective RTO West TO and FERC-jurisdictional utility. The Filing Utilities Group has never in fact addressed this concern, and continues to exclude Deseret from participation in vital Stage 2 negotiations. The Commission must recognize the reality that the collaborative process in place is merely a forum for public groups and constituencies to provide input to the Filing Utilities. The Filing Utilities control the RTO negotiation process in that they alone decide what or what not to include in their submissions to the Commission. The collaborative process is neither definitive nor democratic because the ultimate decision making process remains exclusively with the Filing Utilities. To the extent that the FERC expects a jurisdictional TO such as Deseret to participate in RTO West and holds Deseret to the same RTO participation standards, it should *at an absolute minimum* remedy such a blatant exclusion from the Filing Utilities Group and provide Deseret the opportunity to participate on an equal basis as the other jurisdictional transmission owning entities.⁴ Accordingly, the Commission should grant rehearing on this issue and take action consistent with Deseret's prior requests to require the Filing Utilities to admit Deseret as a full member of their Group.

Furthermore, the Commission in Order No. 2000 made clear that it wanted all transmission owners in a region, including municipals, cooperatives, PMAs, and other state and local entities, to participate in RTO formation. See Order No. 2000 at 31,200-1. It said that it expected "public power entities and cooperatives to participate fully in the collaborative process for forming RTOs." *Id.* at 31,201. Unfortunately, the Filing

⁴ As Deseret understands the Filing Utilities' position, Deseret has been excluded solely because it is not an investor-owned utility like the other applicants. Of course, BPA was included because it is the owner of a significant majority of transmission facilities that will ultimately be incorporated in the RTO West.

Utilities have excluded Deseret from participation in the RTO negotiation process that developed the final Stage 1 and Stage 1-A filings, and the Commission has done nothing to require the Filing Utilities to admit Deseret as a party to their deliberations.

If this systematic exclusion continues in Stage 2, Deseret is troubled that it may be presented with a “take it or leave it” RTO structure that may not be in the best interests of Deseret and its member cooperatives. Deseret wishes the Commission to be aware of this possibility now, at a time when the Commission can still take steps to require the Filing Utilities to allow Deseret to participate fully in the RTO negotiation process and the Stage 2 Filing. Deseret also wishes to point out the possible unintended effect which if not clarified could be interpreted as approving the deliberate exclusion of Deseret.

If the Commission does not take action now to address Deseret's exclusion from the Filing Utilities Group, then Deseret in the alternative seeks a Commission ruling that RTO West, once formed, cannot treat Deseret in a discriminatory manner *vis a vis* entities in the Pacific Northwest that participated in the Filing Utilities Group and subsequently joined RTO West. The Commission in Order No. 2000-A noted that while RTOs can make proposals to charge non-RTO participants different rates, such rates must be demonstrated to be just and reasonable. The Commission agreed that “such demonstration must account for the reasons underlying non-participation including, among other things, impediments to participation that could not be overcome through the collaborative process.” Order No. 2000-A at 31,385. In this instance, a regional TO is seeking to participate fully in the RTO negotiation process, and is being blatantly excluded. The “impediments to participation” are the Filing Utilities themselves and an unfortunate misreading of the April 26 Order. Thus, Deseret believes that RTO West

could not in the future justify as reasonable any such differential rate scheme as to Deseret, and it requests a Commission ruling to this effect at this time.

B. The Commission Erred By Failing To Rule On Deseret's Proposed Clarification To The Definition of "Affiliate" Contained In The Bylaws.

In its November 20 Pleading (at 8-9), Deseret requested a clarification to the definition of the term "Affiliate" set out in Section 1(a) of the proposed RTO West Bylaws. See Attachment J. Deseret argued that the clarification was necessary to ensure that the RTO West would permit separate membership in the RTO by distribution cooperatives that might be members of a larger generation and transmission cooperative, such as Deseret, that would itself be a transmission owning entity and member of the RTO. Accordingly, Deseret requested that the Commission order the Filing Utilities to revise the definition of an Affiliate in the RTO's proposed bylaws, and provided proposed language to accomplish this change.

The April 26 Order did address the governance of the RTO West and the proposed Articles of Incorporation and Bylaws. See 95 FERC at 61,325-32. At no point in its discussion of the Bylaws did the Commission address Deseret's concern regarding the unduly narrow definition of "Affiliates." Because the Commission, however, found the Bylaws to be in conformance with Order No. 2000 (95 FERC at 61,238), Deseret must assume that its request for modification for the bylaws has been rejected, albeit with no explanation whatsoever. For this reason, Deseret seeks rehearing on the grounds that the Commission has failed to engage in reasoned decision making on this issue and the Commission has rejected Deseret's request for modification of the bylaws without an explanation.

C. The Commission Erred By Failing To Rule On The Issue Of Smaller Transmission Owner Participation In The Major Transmitting Utility Class.

In its November 20 Pleading, Deseret protested the distinction within the RTO West Bylaws (Attachment J) between a "Major Transmitting Utility" and all other owners of transmission facilities that contribute assets to the RTO West. A "Major Transmitting Utility" is defined by the Bylaws as "a Transmission Owner which individually or together with one or more of its Affiliates, owns transmission assets having a net book value greater than or equal to two percent of the aggregate net book value of the RTO West Transmission System." Attachment J, Pages 3-4, § 1(u). Deseret explained that the remaining transmission owners that contributed their assets would not be totally excluded from RTO membership, but would be forced to participate in the "Transmission Dependent Utilities" ("TDU") class. Deseret explained that such a result is contrary to the spirit of Order Nos. 2000 and 2000-A:

The Filing Utilities fail to explain why such a division between "major" Transmitting Utilities and other transmitting utilities is necessary, and moreover why they have employed a "two percent of net book" threshold as their "bright line" test for a "major" Transmitting Utility. Not surprisingly, however, defining the "Major Transmitting Utility" class in this manner limits the eligibility for this class to the Filing Utilities themselves, i.e., the incumbent investor-owned utilities and BPA. No other utilities within the RTO West footprint (with the exception of the TransConnect ITC proposed by six of the nine Filing Utilities) would qualify for the class, notwithstanding the fact that all "Participating Transmission Owners" turning their transmission facilities over to RTO West would be required to execute the same or substantially similar Transmission Operating Agreements with the RTO.

November 20 Pleading at 3-4 (footnotes omitted).

Accordingly, Deseret argued that the transmission owners' membership class should be open to all "Participating Transmission Owners" rather limiting it to just "Major Transmitting Utilities." Deseret explained

any entity that submits its transmission assets to the RTO's operational control (assuming that the RTO finds the assets of sufficient commercial/operational interest to accept them), should be afforded the *right, but not the obligation*, to join a Participating Transmission Owners class under the Bylaws. Some entities might prefer to join the Transmission Dependent Utilities class or any other class which is appropriate, as they may feel that their interests are better represented by that class. The RTO West should be indifferent to the selection made, as each unique entity is only afforded one membership and one vote under the Bylaws in the class it ultimately joins.

Id. at 4 (emphasis in the original). Deseret provided additional justification for providing for a broader transmission owner class as well as reasons why the Filing Utilities' proposal was, in fact, deficient.

In its April 26 Order, the Commission addressed many aspects of the RTO West proposed governance structure, including the composition of the member classes, the Trustees Selection Committee, and the Board of Trustees itself. Deseret's concern was summarized as follows:

RTO West's proposed Bylaws should not restrict a transmitting utility that contributes its assets to the RTO from participating in an appropriate membership class. Deseret requests that the Bylaws be amended to afford any entity that submits its transmission assets to the RTO's operational control the right, but not the obligation, to join a Participating Transmission Owner class under the RTO West Bylaws. Deseret complains that the threshold for membership in the Major Transmitting Utilities class (which is defined as including utilities owning transmission assets having a net book value greater than or equal to two

percent of the aggregate net book value of the RTO West Transmission System) creates a moving target.

95 FERC at 61,327.

While the Commission thus grasped the nub of Deseret's argument on this issue, the Commission's ensuing discussion focused on issues raised by other parties, particularly the issue of participation of the divested transmission owner-sponsors of the TransConnect ITC in the TDU member class. Ultimately, the Commission clarified that these divested transmission owners should be afforded access to the TDU member class. However, the Commission never ruled on Deseret's specific issue: expansion of the bylaws to create a broader "Participating Transmission Owners" class, rather than relegating smaller TOs to the Transmission Dependent Utilities class.⁵ The Commission then stated that the

RTO West Applicants propose a process for determining the RTO West slate of Trustees that we find will ensure a fair and non-discriminatory selection of Trustees. . . . Accordingly we find the RTO West Applicant's governance proposal, as set forth in the RTO West Articles of Incorporation and Bylaws, satisfies the independence standard set forth in Order No. 2000.

Id. at 61,328.

Because of this sweeping finding, Deseret must assume that its proposal to amend the Bylaws to broaden the Major Transmitting Utilities class has been rejected. This rejection of Deseret's concern is particularly troubling in light of the April 26 Order's focus on the RTO West as a starting point for a larger RTO. Indeed, if larger TOs in

⁵ Indeed, Deseret's argument, which relates to the scope of the Major Transmitting Utilities Class, was improperly lumped into a subcategory in the April 26 Order entitled "Membership in the Transmission Dependent Utilities Class." This perhaps explains why Deseret's concern was not explicitly ruled upon.

California or other portions of the Western Interconnection were to join the RTO West, some TOs that currently qualify as Major Transmitting Utilities may soon find themselves excluded from this class as well. In this context, Deseret's argument that the membership class, as currently drafted, is a moving target becomes even more necessary to address. The Filing Utilities (whose interest in this argument should be heightened by the Commission's April 26 Order) have done nothing to address this concern.

Accordingly, Deseret seeks rehearing, on the ground that the Commission has arbitrarily and capriciously rejected Deseret's requested bylaw modification on this issue without explanation.

D. The Commission Should Clarify Its Position Regarding The Eligibility Of TOs Other Than TransConnect For Incentive/Innovative Rates Under The RTO West Structure.

In its April 26 Order, the Commission stated that

[w]here, as in this hybrid RTO, a participating transmission owner is independent of market participants, we believe that is [sic] has the ability to include in its "revenue requirement" filing a request for performance-based rates and other incentive-oriented rate recovery mechanisms.

We believe it is appropriate to allow a transmission entity that is independent of market participants to include a request for innovative rate treatments under Order No. 2000 in its Section 205 revenue requirement because a) independent entity will not have an incentive to submit a proposal that would discriminate among particular market participants.

95 FERC at 61,338 (footnotes omitted).

Although this explanation was provided by the Commission in response to a challenge by an intervener to the TransConnect's ability to file for incentive rates in a

hybrid ISO/Transco structure, the passage could potentially be construed to indicate a significant shift in the Commission's general policy on incentive rates set forth in Order Nos. 2000 and 2000-A. By negative inference, the Commission could be seen as indicating that those TOs participating in RTO West that have not joined the TransConnect ITC are not "independent of market participants." More importantly, the passage could be read to infer that these same TOs would somehow be able to use their transmission to benefit their own generation, **even after handing functional control of their transmission facilities over to RTO West**, and therefore, cannot be given the right to seek any rate incentives in their own individual revenue requirement filings.

It was Deseret's understanding of Order No. 2000 and 2000-A that contribution of transmission assets to a FERC-approved RTO (through either transfer of functional control or some other measure, including lease or sale) was the prerequisite for the ability to apply for the innovative transmission rate treatments set forth in Section 35.34(c) of the Commission's Regulations. The form of the RTO (ITC, ISC, Transco, etc.) was not to be a factor. Indeed, in Order No. 2000, the Commission stated that

we believe that the Commission's approach to evaluating innovative transmission reforms should be neutral with respect to the organizational structure of the Applicant, so that RTOs that own transmission assets as well as RTOs that do not own transmission assets would be equally eligible for such ratemaking treatments. . . .

. . . .

. . . while certain of these innovative pricing proposals may be more helpful to one RTO structure than another (e.g., ISO vs transco) we do not believe that any of these pricing proposals would be incompatible with any particular structure adopted by RTOs.

Order No. 2000 at 31,192.

From the language of the April 26 Order, however, it appears that the bar may have been raised for entities that have not divested their transmission assets but rather chosen to cede functional control of them to an ISO such as RTO West. This policy change would affect Deseret should it choose to join the RTO West. This policy change would also affect the other RTO West TOs that have not chosen to join in the TransConnect ITC proposal (Bonneville Power Administration, Idaho Power, and PacifiCorp) as well as other municipal and cooperative transmission entities within the existing or future footprint of RTO West that may, in fact, be legally prohibited from joining a for-profit independent transmission company, or divesting their transmission assets to another entity. By eliminating the ability of TO participants in ISOs that cede functional control of their transmission facilities to apply for innovative rate treatments for certain activities (e.g., transmission expansions), the Commission would eliminate the fundamental premise of incentive rate mechanisms: the improvement of grid operations by creating incentives for an RTO and the TOs that are under its control to make efficient operating and investment decisions, without compromising system reliability. See Order No. 2000 at 31,182-5.

If the Commission has indeed now concluded as a policy matter that TOs cannot eliminate the presumption that they will use their ownership of transmission facilities to benefit their own generation interests by joining an ISO and ceding functional control of their transmission to that ISO, this is a fundamental change in Commission RTO policy that requires more procedural due process than the Commission has to date engaged in through these dockets. If a TO such as Deseret cannot join RTO West, cede functional control of its transmission facilities to the RTO West ISO, and by so doing alleviate

concerns about transmission-related self-dealing (concerns that would be a barrier to eligibility for innovative rate treatments), then the Commission is fundamentally revising its RTO policy.⁶ If so, the Commission should engage in a rulemaking process to change Section 35.34(e) of its Regulations to delineate exactly what would be necessary for a TO participating in an RTO/ISO to become eligible for innovative rates.

If, however, Deseret has misconstrued the April 26 Order, the Commission should so clarify, and explain what it meant by its discussion of the eligibility of TOs that have not divested their transmission facilities for rate incentives.

E. The Commission Should Clarify That Incentive Rate Mechanisms Will Be Available To TransConnect, Not To The “Passive” Owners Of TransConnect.

In the April 26 Order’s discussion of the Section 205 filing rights of RTO West’s member TOs, *see* 95 FERC at 61,336-9, the Commission made the following statement:

We believe it is appropriate to allow TransConnect, as an organization that is independent of market participants, the flexibility to propose mechanisms that will provide incentives for the TransConnect members to take actions within their control to improve grid operation.

Id. at 61,338 (emphasis added). Deseret seeks clarification of this statement insofar as it relates to the individual, passive owners of the TransConnect ITC.

As Deseret understands the proposed business structure of the Transconnect ITC, its forming utilities will divest their transmission assets to the ITC, and take back passive

⁶ This position does not eliminate other concerns: a transmission owning entity that owns no generation may meet the Commission’s “independence” test but nevertheless may have an incentive to overbuild new transmission or seek excessive rates for its existing transmission assets through the vehicle of innovative ratemaking. The Commission has committed to reviewing all applications on a case-by-case basis and will apply a FPA Section 205 analysis to address the incentive to favor “wires solutions.” *See* April 26 Order at 61,339. The Commission should hold no illusions that a pure transmission-only entity organized for profit will not hesitate to use such practices to maximize returns.

ownership interests in the ITC. They will effectively become TDUs, and will no longer own or operate their divested transmission facilities. If this is indeed the case, the passive owners should not be eligible to take any actions with regard to the transmission grid. The TransConnect ITC itself will be the Participating Transmission Owner within the RTO that owns and operates all of the divested transmission facilities, and undertakes any expansion of them. If the members of the TransConnect ITC were to be involved in operating the transmission grid, they by definition would not be mere passive owners.

In *Southern Company Services, Inc.*, 94 FERC ¶ 61,271 (2001), the Commission made this distinction, as well as the purpose in granting incentives to the appropriate transmission owner, clear:

The Southern Companies propose numerous PBR and cost incentives associated with membership in the RTO. Those of the PBR incentives that operate to motivate the grid operator to perform in response to the market and to improve grid operation are consistent with Order No. 2000, and therefore would be acceptable for an approved RTO. In other words, we would accept those incentives that are properly configured in that they reward the grid operator and decision-maker for improved grid performance (or penalize lackluster performance), in a manner consistent with Order No. 2000.

However, other incentives (such as the increased ROE on existing plant and the automatic tracking of certain costs) are not designed in a manner consistent with Order No. 2000 and Section 35.34(e) of the Commission's regulations, and therefore are not acceptable. **This is because these incentives would flow to the transmission owners who, because they are proposed to be passive owners of the RTO, do not make any decisions regarding grid operations. Simply put, it is inappropriate to send a price signal to a passive owner that cannot respond to the price signal.**

Id. at 61,965 (emphasis added)(footnotes omitted).

The Commission should clarify that it meant Participating Transmission Owners such as TransConnect would be eligible for incentives, rather than each individual TransConnect passive owner/LLC member in its own individual capacity. Indeed, under a truly passive ownership scheme, the TransConnect members would benefit from incentive rates granted to the TransConnect ITC (the Participating Transmission Owner in the RTO) where TransConnect makes and the Commission accepts innovative/incentive rate proposals that will enhance efficiency over or develop new transmission paths within the footprint of the RTO.⁷ The passive owners would benefit by enjoying a share of the resulting profits earned by the Transconnect ITC.

F. The Commission Should Clarify Its Position On Multiple RTO Seams Issues Short Of A “West-wide” RTO.

Perhaps the most significant ruling in the April 26 Order is the Commission’s finding that a “West-wide RTO” would be “the most efficient outcome for the West.”⁹⁵ FERC at 61,342-43. To this end, the Commission directed the RTO West participants to continue to work on seams-related issues with the ultimate goal of such a West-wide RTO, and further directed the RTO West Applicants to make a status report no later than December 1, 2001. *Id.* at 61,243.

Deseret is concerned that during the interim period between the implementation of the RTO West (and other Western RTOs) and such future time as a truly West-wide RTO can be created, there will be considerable seams issues amongst neighboring RTOs.⁸

⁷ Similarly, as the *Southern* order suggests, the TransConnect members should indirectly be penalized for lackluster performance of TransConnect, through the reduced profits payable to them as passive owners.

⁸ Deseret’s use of the term “seams” can be generally defined as different policies, practices, and contractual obligations between a RTO and those transmission entities (whether a single TO or another RTO) that are directly interconnected with the RTO.

Deseret believes that such issues can detract from the efficacy of Western RTOs and contribute to inefficiencies in regional transmission policy. For this reason, Deseret seeks two clarifications of what the Commission views to be reasonable practices with regard to seams. First, for what policies or practices will seams be tolerated? For example, are different times for scheduling deadlines acceptable? Second, what is a reasonable timetable for “short-run” resolution of seams issues, prior to the creation of a West-wide RTO? Without such clarification, it will be impossible for TOs in the West to evaluate whether their progress towards a single RTO for the Western Interconnection is sufficient to satisfy the Commission.

G. The Commission Erred In Rejecting The Limited Liability Agreement Without A Full Understanding Of The Practical And Legal Ramifications Of Such A Rejection.

In its April 26 Order, the Commission rejected the Limited Liability Agreement that the Filing Utilities submitted as part of their Stage I Filing, stating that

[i]n Order No. 888, the Commission discussed the indemnification provision of the pro forma tariff (Section 10.2). The Commission explained that it did not believe it appropriate to require transmission customers to indemnify transmission providers in cases of negligence or intentional wrongdoing by the transmission provider.

In Order Nos. 888-A and 888-B, the Commission further explained that the pro forma tariff does not address, and was not intended to address, liability issues. Rather, the Commission explained, transmission providers may rely on state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence. In subsequent cases, the Commission has consistently rejected liability limitation provisions in tariffs involving open access transmission service. Further, all of the Commission orders cited by RTO West Applicants (RTO West Applicants' Answer at 33-34 & n.55) for the acceptance of

liability limitation provisions predate Order No. 888 and do not involve open access transmission service.

95 FERC at 61,346-7 (footnotes omitted).

On May 24, 2001, the Commission held a technical conference in Docket Nos. RT01-35-000 and RT01-15-000 dealing specifically with the issues raised by the April 26 Order's rejection of the Limited Liability Agreement. A representative of Deseret attended this conference. At this technical conference, representatives of some of the Filing Utilities and FERC Staff focused on the issue of whether there are, in fact, sufficient state remedies available to RTO West and its participating TOs to protect them from unreasonable potential liability. The parties also discussed the distinction between the liability issues presented by RTO West and the Order No. 888 policy with respect to liability and indemnification. The representatives of the Filing Utilities conceded that they might not have explained such distinctions sufficiently in their Stage 1 Filing.

Based on the discussions between the Filing Utilities, FERC Staff, and other interested parties at the technical conference, there appeared to be consensus that the issues associated with the Limited Liability Agreement may require further Commission consideration and opportunities for all parties to submit substantive pleadings on the merits. It is Deseret's understanding that the Filing Utilities will seek rehearing of this issue, consistent with the discussions held at the technical conference.

Deseret, as a potential participating TO in RTO West, agrees that further consideration should be afforded to the Limited Liability Agreement and the associated issues it raises. Deseret is concerned that if it joins RTO West as a participating TO, it might be exposed to significantly increased risks outside its own control – and not

mitigated by state law remedies - if the Limited Liability Agreement is eliminated. This is not to say, however, that Deseret supports adoption of the Limited Liability Agreement as proposed in all particulars in the Stage 1 Filing.⁹

Deseret cannot state that it supports the Filing Utilities' request for rehearing on this issue because, as stated earlier, the Filing Utilities have not permitted Deseret to participate on an equal basis in their decision making. Deseret therefore does not know the content of the Filing Utilities' rehearing application on this issue. Thus, to properly preserve this issue for rehearing in its own right, Deseret seeks rehearing of the portion of the April 26 Order rejecting the Limited Liability Agreement. Deseret requests that the Commission reserve judgment on the Limited Liability Agreement until such time as all parties have been able to meaningfully contribute to the record on this issue, either by pleading or by additional technical conferences.

H. The Commission Should Clarify That Certain Issues Deseret Raised Regarding The RTO West Stage 1 And Stage 1-A Filings That Were Not Addressed By The April 26 Order Have Not Been Decided *Sub Silentio*.

In its April 26 Order, the Commission provided preliminary guidance in accordance with Order Nos. 2000 and 2000-A on portions of the RTO West and TransConnect proposals, particularly governance, scope and configuration, and the Limited Liability Agreement. However, with respect to a large portion of materials

⁹ In its November 20, 2000 Pleading, Section I.D (pages 13-15), Deseret raised specific concerns regarding certain provisions of the Limited Liability Agreement dealing with the allocation of liability as between the RTO and its member TOs. Assuming that the Commission on rehearing determines to accept the Limited Liability Agreement, Deseret requests the Commission to adopt the changes to that Agreement which Deseret sought.

included with the Stage 1 Filing and the subsequent Amended Supplemental Compliance Filing ("Stage 1-A Filing"), the Commission did not provide a ruling, instead stating:

As noted above, although RTO West and TransConnect have made substantial progress on developing an RTO proposal for the Pacific Northwest, the filings we address today seek preliminary guidance on certain limited issues. Accordingly, this order provides preliminary guidance with respect to Governance, Scope and Configuration, and Liability of RTO West. In addition, we address TransConnect's October 16, 2000 filing only as to the proposed governance structure, its proposal to file rates unilaterally, and its proposed transmission planning and expansion function. As further changes to these proposals are submitted to us for review, we will afford all interested parties an opportunity to comment, and we will address remaining issues in a subsequent order.

95 FERC at 61,324.

Notwithstanding the foregoing, the Commission did in the April 26 Order rule on several discrete issues raised by the draft Transmission Operating Agreement ("TOA"). It also mentioned in passing the Agreement to Suspend Provisions of Pre-Existing Transmission Agreements ("Suspension Agreement"). Since much of Deseret's November 20 Pleading and its January 16 Pleading were focused on specific provisions of these two agreements, Deseret seeks clarification that the Commission in its April 26 Order has not through its silence ruled against Deseret's stated positions on these provisions, nor has it accepted the questioned provisions in either Agreement.

The Commission did not specifically rule on the following issues Deseret had raised in its November 20 Pleading:

- The sufficiency of the Congestion Management draft proposal included as Attachment M. See November 20 Pleading at Section I. F, pages 17-19.

- The sufficiency of the Suspension Agreement proposal included as Attachment U. *See* November 20 Pleading at Section I. G, pages 19-22.
- The phase out of proposed transfer charges for short-term firm and non-firm transmission service before the end of the company rate period, as Deseret had proposed. *See* November 20 Pleading at Section I. H, pages 22-23.

Moreover, the Commission did not discuss any of the issues Deseret raised in its January 16 Pleading relating to the revised TOA the Concurring Utilities had submitted in their Stage 1-A Filing:

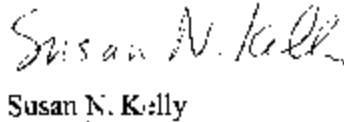
- Exhibit G of the TOA unnecessarily confuses key rate issues such as the allocation of FTRs. *See* January 16 Pleading at Section II. A, pages 4-5.
- Sections 7.1 and 7.3 of the TOA impair the development of competitive markets for ancillary services for all market participants. *See* January 16 Pleading at Section II. B, pages 5-8.
- Section 15.1 of the TOA language regarding FTRs “of comparable value” confuses the issue of what a pre-existing transmission rights holder will receive. *See* January 16 Pleading at Section II. D, page 10.
- Additional modifications to Sections 2.4.2, 2.5, 5.2, 5.2.1-5.2.3, and 5.8.8 of the TOA, as well as Exhibit A to the TOA, are necessary. *See* January 16 Pleading at Section II. E, pages 11-15.

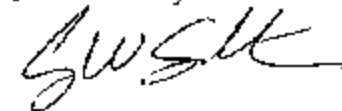
If in fact, the Commission intended to rule on any of the issues discussed above, or to curtail Deseret’s rights to continue to pursue these issues, Deseret seeks rehearing in the alternative on the grounds that the Commission has completely failed to justify any such rulings in its April 26 Order.

III. CONCLUSION

For the reasons stated above, Deseret requests that the Commission clarify and grant rehearing of the April 26 Order in the respects discussed above.

Respectfully submitted,


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Dated: May 29, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 29th day of May, 2001.



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